Supreme Court, U.S.
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No. 08-777

In The Supreme Court of the United States

CARL ERIC OLSEN,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. The federal respondents argue that application of collateral estoppel to Petitioner Olsen's Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb et seq., claim was proper because Olsen was previously given the kind of scrutiny mandated by RFRA under this Court's decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). Citing the decision in *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458 (D.C. Cir. 1989) (hereafter "*DEA*"), they contend that Olsen's Free Exercise Clause claim was examined under the "focused inquiry" required by *O Centro Espirita*, 546 U.S. at 433, by the Court of Appeals for the District of Columbia in 1989 (Br. in Opp. at 10). Significantly, the federal Respondents apparently concede that the other cases[1] relied upon by the courts below for applying collateral estoppel employed the "categorical" compelling interest analysis (which accepts a Congressional finding of a compelling interest as dispositive) rejected by this Court in *O Centro Espirita*.

However, the contention that the "focused inquiry" was employed by the *DEA* court is belied by the very text of the *DEA* decision. Thus, the *DEA* court, in addressing the pivotal issue on Olsen's Free Exercise Clause claim cited *Rush* and *Olsen* and wrote that "[t]hree circuits have so far considered pleas for religious exemption from the marijuana

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[1] *United States v. Rush*, 738 F.2d 497(1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985) (hereafter "*Rush*"), and *State v. Olsen*, 315 N.W.2d 1 (Iowa 1982) (hereafter "*Olsen*").

laws; each has rejected the argument that accommodation to sacramental use of the drug is feasible and therefore required. . . . We have no reason to doubt that these courts have accurately gauged the Highest Court's pathmarks in this area." *DEA*, 878 F.2d at 1462.[2] If there is any doubt that the *DEA* court was simply adopting the "categorical" approach applied in *Rush* and *Olsen*, it is dispelled by that court's comment that "Olsen's free exercise claim has been raised, considered, and rejected in the context of criminal proceedings. . . . We agree, substantially, with those dispositions, and therefore need not treat the issue expansively." *DEA*, 878 F.2d at 1461. The *DEA* court's cursory examination of the compelling interest issue and reliance on the rulings of cases that clearly applied the "categorical" approach this Court rejected in *O Centro Espirita* demonstrates that it did not apply the "focused" inquiry mandated by RFRA.

The *DEA* court's discussion of the accommodation proposed by Olsen in that case also fails to show that the rigorous and focused

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[2] The *DEA* decision also cited *United States v. Middleton*, 690 F.2d 825 (11th Cir.1982), *cert. denied*, 460 U.S. 1051 (1983), which used the "categorical approach" in rejecting a Free Exercise Clause challenge to the prohibition on marijuana use. "Congress has strongly and clearly expressed its intent to protect the public from the obvious danger of drugs and drug traffic. *See* 21 U.S.C. § 801(2) (1976). Unquestionably, Congress can constitutionally control the use of drugs that it determines to be dangerous, even if those drugs are to be used for religious purposes." *Middleton*, 690 F.2d at 825.

examination mandated by *O Centro Espirita* was employed by the *DEA* court. Under RFRA, as interpreted by *O Centro Espirita*, 546 U.S. at 428 and 433, it is the government which must shoulder the burden of proving that it has a compelling interest for the application of the law against an individual. *See also* 42 U.S.C. § 2000bb-2(3) (for purposes of RFRA, the term "demonstrates" means that it meets the burdens of going forward with the evidence and of persuasion). There is no indication in either the *DEA* decision or the underlying administrative decision under review that the government was put to the burden of offering evidence that it had a compelling interest in applying the prohibition on marijuana to Olsen and his religious practices.

Contrary to the federal Respondents' arguments, Olsen is not arguing that collateral estoppel should be avoided here because the prior cases were wrongly decided (although Olsen does not concede that the prior cases correctly resolved the constitutional claims he made in those cases). The point is that the controlling legal principles, as established by the intervening enactment of RFRA and the decision in *O Centro Espirita*, have changed or been clarified. Those legal principles differ in a crucial and significant way from those applied in the previous cases where Olsen's Free Exercise Clause claims were at issue. The interest in finality which the federal Respondents advocate must yield where the principles defining the rights at issue have become obsolete and erroneous. *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948).

2. With respect to Olsen's Free Exercise Clause claim, the federal Respondents resort to parroting the decision below, asserting that a law is "generally applicable" for purposes of *Employment Division v. Smith*, 494 U.S. 872 (1990), even if the prohibition the law establishes has exceptions. As with the Court of Appeals' decision, the federal Respondents cite no case law to support this position (Br. in Opp. at 13). As pointed out in Olsen's petition, the requirement of general applicability is not satisfied if the law provides for exemptions to a prohibition but does not allow for exemptions on the basis of religious beliefs. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 537 (1993).

Any claim that the federal marijuana prohibition is generally applicable must be deemed without credibility in light of recent declarations by Respondent Holder, the Attorney General of the United States, that the federal government will no longer pursue prosecution against purveyors of marijuana in those states that have legalized the use of marijuana for medical purposes. *See* http://www.washingtonpost.com/wp-dyn/content/article/2009/04/10/AR2009041001288.html (Attorney General Holder announced that the federal government would no longer go after groups that supply medical marijuana in the thirteen states where it is legal) and "Holder's pot policy unclear on old state cases," available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/04/10/MN5816UOLA.DTL (Attorney General Holder announced that

federal agents will target only persons who violate both federal and state law; anyone complying with the medical marijuana law in the 13 other states with such laws would be left alone). If the federal government believes there should be an exemption for the use of marijuana for purported medical reasons, the Free Exercise Clause forbids denying a similar exemption for Olsen's use of marijuana as part of his religious beliefs unless the government demonstrates a compelling interest for denying Olsen that exemption.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, the writ should be granted.

Respectfully submitted,

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